No. 89-1293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

W.C. GARCIA & ASSOCIATES, INC.,
Petitioner,

—v.—

FRANK S. MICELI, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN RESPONSE TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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ARGUMENT

The Government makes two arguments: this injunction action is moot and, in any event, money seized or collected in violation of § 6213(a) can only be recovered in a refund suit under § 7422(a).

In order to evaluate the serious flaw in the Government's mootness argument, it is helpful to consider the Taxpayer's first action. If the "capable of repetition, yet evading

* The Rule 29.1 listing was complied with in the Petition.

review" argument had been raised in that case, no doubt the Government would have argued that since the assessment has been satisfied, it is not at all likely the Government will further pursue the Taxpayer. But in this second case, it is shown the Government has again made an illegal assessment and again threatened the Taxpayer with collection action if the second illegal assessment was not paid. By continuing to argue that such illegal collections can only be corrected by refund suits, under § 7422(a), the Government strengthens the Taxpayer's argument that such action can easily escape review under § 6213(a).

The most glaring vacancy in the Government's mootness argument is its abstinence from reconciling it with the Court's holding in *Laing v. United States*, 423 U.S. 161 (1976), that an injunction there should be issued under § 6213(a) although all the assessments in issue had been collected and a refund suit was pending in the district court while this Court was considering the injunction action. *Id.*, at 165-166, n.6. There was no mention of mootness in *Laing*.[1]

Surprisingly, the Government unequivocally argues that even if a premature assessment is made in violation of § 6213(a), the district court can not order the return of funds seized based on such illegal assessment (Br. 8-9). The Government does so without attempting to refute our argument that the district court in this case had all the inherent equitable powers to order the return to the Taxpayer of funds seized or collected in satisfaction of the illegal assessments, regardless of whether the injunction issue is moot, once it had jurisdiction under § 6213(a) (See Pet. 16-18). It is of little comfort to the Taxpayer if the Government can make illegal tax collections in direct violation of § 6213(a), but § 6213(a) can be frustrated by limiting the district court to ordering the Government to stop.

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1 Nor did the Court indicate in granting an injunction under § 6213(a) there first must be a finding of irreparable harm and no other adequate legal remedy. Subsequently, the Ninth Circuit added such required findings in *Cool Fuel v. Connett*, 685 F.2d 309 (9th Cir. 1982).

The remedy under § 6213(a) of an injunction suit would be of no value to a taxpayer once the Government has seized the funds under an illegal assessment, if the Government's argument is to be accepted. Once the illegal assessment is collected the Government argues the case is moot, as was done in the first Garcia case,[2] and once any funds are collected they can only be recovered through a refund suit. Thus, the very purpose of § 6213(a) can be completely frustrated, if the Government's argument is to be accepted, and taxpayers, such as here, can be denied access to the Tax Court through Government violations of expressed prohibitions of § 6213(a).

The Government has not answered our argument that exceptions exist to the general rule that refund suits are required to obtain the return of tax dollars, nor has the Government acknowledged our consistent argument that this is not a refund suit anymore than a mandamus action is a refund suit (See Pet. 19-20).

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2 There has never been a finding by any court that the assessment and collection actions in the first case were lawful and the Taxpayer there consistently argued the assessment and collection actions were illegal. When that case was held to be moot, the Government was able to avoid litigating the issue, and thereby avoid answering the Taxpayer's argument that *Cool Fuel, Inc. v. Connett*, *supra*, 685 F.2d 309 (9th Cir. 1982) failed to follow *Laing v. United States*, *supra*, 423 U.S. 161 (1976), by misapplying *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and failed to apply *TVA v. Hill*, 437 U.S. 153 (1978) (See Pet. 13-15).

CONCLUSION

For the foregoing reasons and the additional reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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